

**BEFORE THE SECRETARY OF STATE  
STATE OF COLORADO**

**CASE NO. OS 2008-0041**

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**AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINT FILED BY JON CALDARA REGARDING  
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY COLORADO  
PROFESSIONAL FIRE FIGHTERS**

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This matter is before Administrative Law Judge (ALJ) Robert Spencer upon a complaint by Jon Caldara that Colorado Professional Fire Fighters (CPFF) violated fair campaign finance and practice laws by failing to register as an issue committee and report its advertising expenditures to the Secretary of State.

The Secretary of State received Caldara's complaint November 7, 2008. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts (OAC) for hearing. Hearing upon the complaint was held at the OAC November 25, 2008. Mark G. Grueskin, Esq. of Isaacson Rosenbaum P.C., represented defendant CPFF. Mr. Caldara represented himself.

**Issue**

Amendment 49 was a state-wide ballot issue seeking to amend the Colorado Constitution to restrict state and local government paycheck deductions for such things as dues and fees for labor and other organizations. During the run-up to the November 2008 general election, CPFF paid for radio advertisements expressly advocating the defeat of amendment 49. The nature and purpose of CPFF was not established at the hearing, but it is undisputed that CPFF was not registered with the Secretary of State as an issue committee as that term is defined in the Colorado Constitution, nor did it file any report of its expenditures for the radio ads in question. Caldara, a proponent of amendment 49, complains that by buying ads opposing amendment 49, CPFF became an issue committee required to register and report its expenditures. Its failure to do so subjects it to the civil penalties provided by law.

CPFF on the other hand contends that Caldara failed to prove that "a major purpose" of its existence was to oppose amendment 49, and therefore he failed to meet his burden of proving that CPFF was an issue committee required to register or report its expenditures.

For reasons explained below, the ALJ agrees that the evidence presented at the hearing is insufficient to prove that a major purpose of CPFF's existence was to oppose amendment 49, and is thus insufficient to prove that CPFF was an issue committee.

## **Findings of Fact**

1. Amendment 49 was a state-wide ballot issue seeking to amend the Colorado Constitution to restrict state and local government paycheck deductions for such things as dues and fees for labor and other organizations.<sup>1</sup>

2. During the run-up to the November 2008 general election, CPFF paid for radio advertisements expressly advocating the defeat of amendment 49. The advertisements were approximately 60 seconds long, and characterized amendment 49 as a “naked power grab” by “business tycoons” intended to strip fire fighters of “having a say” regarding the equipment they use and training they get. The ad urged voters to “draw the line” and “vote no 49.” The ad ended with the statement that it was “paid for by Colorado Professional Fire Fighters.”

3. CPFF’s radio advertisements aired on at least two Denver radio stations on at least a total of 118 occasions. A shorter 15 second version also aired on a local traffic update network on approximately 158 occasions.

4. CPFF did not register with the Secretary of State as an issue committee, nor did it report to the Secretary of State its expenditures for the anti-amendment 49 ads.

5. Other than its title and the nature of its advertising which suggest CPFF is most likely a membership organization advocating the interests of Colorado fire fighters, no evidence was offered at the hearing as to its organizational structure, its governing documents, its membership, how long it has been in existence, its goals or purposes, its budget, or the types of activities in which it has historically engaged.

6. No evidence was offered as to how much money CPFF spent to buy and air the ads in question.

## **Discussion and Conclusions of Law**

### *Colorado’s campaign finance laws*

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

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<sup>1</sup> The ALJ takes judicial notice of the subject of this amendment from the 2008 State Ballot Information Booklet (Bluebook) at [www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/bluebook/2008Bluebookmainpage.htm](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/2008Bluebookmainpage.htm).

### *Issue committee obligations*

Issue committees supporting or opposing state-wide ballot issues are required by the FCPA to register with the Secretary of State. Section 1-45-108(3), C.R.S. They must also file periodic reports of contributions received, including the name and address of any donor of \$20 or more, and the name, address, occupation and employer of any donor of \$100 or more. Section 1-45-108(1)(a)(I) and (II), C.R.S. Issue committees must also report expenditures made as well as their balance of funds and identify their financial institution. Sections 1-45-108(1)(a)(I) and (2)(b), C.R.S.

This case involves expenditures to purchase anti-Amendment 49 radio advertising. An “expenditure” is defined as “any purchase, payment ... or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question.” Colo. Const. art. XXVIII, § 2(8)(a). Because the anti-amendment 49 advertisements expressly advocated the defeat of a ballot issue, the moneys used to purchase those ads were expenditures that had to be reported, if made by an issue committee.

An issue committee that fails to register with Secretary of State or fails to report its expenditures is subject to civil penalties as provided by Colo. Const. art. XXVIII § 10(2). The question is whether CPFF was an issue committee.

### *Issue committee defined*

Caldara contends that because of its anti-Amendment 49 advertising, CPFF was an issue committee. As defined by Article XXVIII, § 2(10)(a), an “issue committee” is:

any person, other than a natural person, or any group of two or more or more persons, including natural persons:<sup>2</sup>

(I) That has *a major purpose* of supporting or opposing any ballot issue or ballot question; *or*

(II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

*Italics added.*

### *The definition of issue committee requires proof of “a major purpose”*

At first blush, § 2(10)(a) appears to include within the definition of issue committee any organization that contributes or spends more than \$200 to oppose an issue, regardless of whether the organization’s major purpose is to oppose that issue. CPFF argues, however, that the “or” connecting subsections (a)(I) and (a)(II) must be read as “and”, thus requiring proof in every instance that the entity had “a major purpose” of opposing or supporting an issue. CPFF thus contends that in the absence

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<sup>2</sup> A “person” includes associations, corporations, labor organizations, “or other organizations or group of persons.” Colo. Const. art. XXVIII, § 2(11).

of proof that opposing amendment 49 was a major purpose of its existence, the complaint against it must be dismissed.

In interpreting the meaning of "and" or "or" in statutes, regulations, and ordinances, the substitution of one for the other may be necessary. *Smith v. Dep't of Human Services*, 916 P.2d 1199, 1201 (Colo. App. 1996). Although the word "or" is generally presumed to be used in the disjunctive sense, courts may construe "or" to mean "and" in order to carry out the plain meaning or intent of the legislature, *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993); or may substitute "or" for "and," and vice versa, to avoid an absurd or unreasonable result. *Waneka v. Clynche*, 134 P.3d 492, 494 (Colo. App. 2005). In determining legislative intent, courts may consider, among other things, the object to be attained, the legislative history, laws on the same or similar subjects, the consequences of a particular construction, and the administrative construction of the statute. *Gamble v. Levitz Furniture Co.*, 759 P.2d 761, 764 (Colo. App. 1988), *cert. dismissed* 782 P.2d 1197 (Colo. 1989); § 2-4-203, C.R.S. The balance of these factors favors CPFF's interpretation.

First, interpreting the "or" as "and" is consistent with case law in a similar context, that related to "political committees." Due to the need to protect the First Amendment right to free speech, a government may not restrict groups advocating the election or defeat of a political candidate unless doing so is the major purpose of their existence. *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964, 970 (Colo. 2007) ("a group is not a 'political committee' unless its 'major purpose' is to influence elections"), citing *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). The reason for this "major purpose" rule is to keep campaign finance laws from casting too broad a net, ensnaring groups formed primarily for purposes other than candidate advocacy, and thus being unconstitutionally overbroad. See *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137, 1153 (10<sup>th</sup> Cir. 2007) (without the major purpose test, the law would "operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets.")

Although no Colorado case has specifically applied this rationale to issue committees as currently defined in Colorado law, it is logical that it should apply. Issue advocacy is even more worthy of protection from overbroad regulation given that "discussion of public issues ...[is] integral to the operation of a system of government established by our constitution." *Gilbert, supra* at 969. "First Amendment freedoms need breathing space to survive," and therefore "we must proceed with caution and with an insistence upon specificity as to the circumstances under which disclosure is required." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 756 (Colo. 2000). This need for caution is even greater in the area of issue advocacy, as opposed to candidate advocacy. Although the "identity of supporters and opponents of a ballot initiative would be potentially helpful to the electorate ... the information is not nearly as critical as the identity of candidate supporters." *Id.* at 755. Given this overriding concern for protecting issue advocacy, the consequence of not applying the major purpose test to the definition of an issue committee is that the definition is likely to be overbroad and

constitutionally infirm.<sup>3</sup>

Second, requiring that an issue committee have a major purpose of supporting or opposing a ballot issue is consistent with the intent of Article XXVIII. The Colorado Court of Appeals recently observed that the electorate's intent in adopting the "major purpose" test was to require disclosures by "entities that exist to influence election outcomes as to ballot issues," and not to require disclosures by "entities that do not have such influence as a major purpose." *Independence Institute v. Coffman*, \_\_\_ P.3d \_\_\_ (Colo. App 2008), No. 07CA1151 (Colo. App. Nov. 26, 2008), slip op. p. 5; *see also Colorado Right to Life Committee, supra* at 1155 (noting that Article XXVIII's inclusion of the major purpose test within the definition of issue committee suggests "that the legislature was well aware of *Buckley's* requirements when it drafted Article XXVIII"); and *Common Sense Alliance, supra* at 754-55 ("We observe that a narrow interpretation of the definition of 'issue committee' is not inconsistent with the larger purpose behind the FCPA.") Consistent with that intent, it makes sense to interpret the "or" as "and" so that the registration and disclosure obligation applies only to entities that have a major purpose of influencing ballot issue elections.

Finally, the Secretary of State, via Rule 1.7, has also interpreted the "or" to mean "and." That rule dictates that "A person or group of persons is an issue committee only if it meets *both* of the conditions in Article XXVIII, Section 2(10)(a)(I) and 2(10)(a)(II)." 8 CCR 1505-6, Rule 1.7(b)(*italics added*).<sup>4</sup> Where language is reasonably susceptible of more than one interpretation, and the agency has employed its expertise to select a particular interpretation, courts must defer to the agency's interpretation. *Colorado State Board of Accountancy v. Paroske*, 39 P.3d 1283, 1286 (Colo. App. 2001)(citing *Colorado State Personnel Board v. Department of Corrections*, 988 P.2d 1147 (Colo. 1999)); *Pigg v. State Dep't of Highways*, 746 P.2d 961, 967 (Colo. 1987).<sup>5</sup> The Secretary of State's rule is within its expertise and is not plainly erroneous, therefore the Secretary's interpretation should be given great deference.

In view of the intent of Article XXVIII, the case law applying the major purpose test in a similar context, and the Secretary of State's interpretation, the ALJ concludes that the requirements of § 2(10)(a) must be read in the conjunctive. An entity must therefore exist for a major purpose of advocating or defeating a ballot issue before it becomes subject to regulation as an issue committee.

*The evidence is insufficient to prove that CPFF  
had a major purpose of opposing amendment 49*

Colo. Const. art. XXVIII, § 9(1)(f) directs that hearings of alleged fair campaign law violations be conducted according to the provisions of the Administrative Procedure

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<sup>3</sup> In *Common Sense Alliance*, the Court narrowly interpreted an earlier definition of issue committee to apply only to entities "created and intended for the purpose of participating in ballot initiative campaigns." *Id.* at 753.

<sup>4</sup> The Court of Appeals in *Independence Institute, supra*, cites this rule without discussion. Slip op. p. 2.

<sup>5</sup> In interpreting a constitutional amendment, a court is guided by principles of statutory construction. *Rocky Mountain Animal Defense v. Colo. Div. of Wildlife*, 100 P.3d 508, 514 (Colo. App. 2004).

Act (APA), § 24-4-105, C.R.S. The APA, in turn, places the burden of proof upon the proponent of an order. Section 24-4-105(7), C.R.S. (“the proponent of an order shall have the burden of proof”). Because Caldara is the complainant seeking an order holding CPFF responsible for violation of the law, he bears the burden of proof.

Although one might assume that radio advertising of the type and extent involved in this case cost well over \$200 to produce and air, that assumption, even if true, is insufficient to make CPFF an issue committee in the absence of proof that a major purpose of its existence was to oppose amendment 49. The evidence proves only that an entity named “Colorado Professional Fire Fighters” paid for radio advertising opposing amendment 49. It does not prove anything about the nature or major purpose of that organization. The ALJ cannot accept Caldara’s argument that an expenditure of the magnitude supposedly involved necessarily requires CPFF to have “a major purpose” of advocating the defeat of amendment 49. The amount of the expenditure and the organization’s major purpose are separate elements. One does not necessarily prove the other. This is especially true in the absence of any evidence about CPFF’s total budget, its organizational history, and the other types of activities in which it engages. *See Gilbert, supra* (the fact that ACF spent \$18,000 on a campaign radio advertisement was not sufficient to prove it was a political committee without factual findings regarding its major purpose). While it may well be true that CPFF did exist for the purpose of opposing amendment 49, the ALJ cannot reach that conclusion upon the record in this case.

### *Summary*

In the absence of proof that CPFF had a major purpose of opposing amendment 49, the ALJ cannot conclude that CPFF was required to register as an issue committee or disclose its expenditures. The complaint must therefore be dismissed.

### **Agency Decision**

The complaint against Colorado Professional Fire Fighters is dismissed.

### **Done and Signed**

December 5, 2008

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ROBERT N. SPENCER  
Administrative Law Judge

Digitally recorded CR #2

Exhibits admitted:

Complainant’s exhibits: 1, 2

Defendant’s exhibits: none

### **CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs  
Secretary of State's Office  
1700 Broadway, Suite 270  
Denver, CO 80290

on this \_\_\_\_ day of December 2008.

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Court Clerk